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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KEYSTONE STEEL & WIRE COMPANY AND INDEPENDENT STEEL WORKERS ALLIANCE,
Respondents.

BRIEF OF KEYSTONE STEEL & WIRE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Keystone Steel & Wire Company, one of the respondents named in the Petition for Certiorari filed by the National Labor Relations Board in this matter, objects to the granting of said petition and pursuant to the provisions of Rule 38 of this Court submits herewith its brief and argument in opposition to said petition. This respondent, feeling that the facts stated by the petitioner in support of its petition are not complete enough to permit intelligent consideration of the petition, makes the following additional statement:

ADDITIONAL STATEMENT.

The statement contained in petitioner's brief omits certain undisputed facts that are deemed essential to proper consideration of the petition. It is stated (Petition, Page 4) that this respondent did not notify its employees of its withdrawal of recognition of K.E.A. as their bargaining agent. Petitioner omits to state that notice of the dissolution of K.E.A. was given the employees in the various departments (P.A. 283; B.A. 151), and that it was a matter of common knowledge and a general topic of conversation among the employees throughout the plant (P.A. 207, 214, 268, 272, 277, 281, 283; B.A. 113, 127, 151, 155).

The petition also states that Alliance, the union now under attack, was permitted to conduct a wide-spread membership campaign in the plant during working hours (Petition, Page 5); that the Company granted Alliance exclusive recognition as bargaining agent without attempting to verify its claimed majority status (Petition, Page 6) and permitted certain supervisory employees to join Alliance (Petition, Page 7). It neglects to point out that no other labor organization, not even the semblance of any other organization, was in any way competing for membership with Alliance among Keystone employees. It further neglects to point out that although Keystone recognized Alliance without actually counting the application cards its representatives had in their possession, a committee from Alliance had the cards with them at the meeting where recognition was granted (P.A. 335) and within a few weeks submitted dues check-off authorizations signed by nearly 1,000 employees out of a total eligible of 1,400 (P.A. 227).

The statement sets forth a claim that the constitutions of K.E.A. and the Alliance were "strikingly similar"

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(Petition, Page 6) and neglects to state that the provisions of the K.E.A. constitution which rendered it an improper bargaining agent under the Wagner Act were all deleted from the constitution of the Alliance. The constitution and by-laws of K.E.A. appear in the record as Board's Exhibit 12 (P.A. 487-499), and those of Alliance as Board's Exhibit 13 (P.A. 500-517).

Petitioner states that the former officers and committeemen of K.E.A., acting as a committee of the Alliance, directed the transfer of certain funds of K.E.A. into the bank account of Alliance (Petition, Page 6) and neglects to mention the further testimony of the man who signed the check, who testified that the funds were transferred at the request of certain former members of a baseball group and not by any committee of the Independent Steel Workers Alliance (P.A. 194, 195).

The petition states that the same persons who had served as officers of K.E.A. immediately prior to its abandonment were elected as the permanent officers of Alliance (Petition, Page 7). It neglects to call to the attention of this Court Board's Exhibit 21 (P.A. 539-541) which discloses that such officers were elected at an open meeting of the Alliance, that there were at least three candidates for each office and that more than 700 members voted on the candidates whom they wished to represent them as officers and committeemen.

Finally, it is alleged (Petition, Page 8) that when the C.I.O. Union appeared on the scene and engaged in competition with Alliance for membership, it was denied the same organizing privileges that had been accorded Alliance. This statement we challenge. The evidence shows the Board's decision on this point was based almost entirely upon the so-called "no-solicitation" rule of the Company, and upon the claim this rule was enforced dis-

criminatorily. Yet the rule was adopted in 1940—two years before the C.I.O. Union appeared—and it was enforced after 1942 only upon the specific complaint of an employee (P.A. 215, 216, 240, 242, 262, 263). Even the President of the C.I.O. Union stated the Company did not discriminate against him although the management knew he was campaigning for C.I.O. members on company property "before working hours, after working hours and on working hours." (P.A. 207, 212, 213).

We believe it necessary to list these omissions to present to the Court a more complete and accurate picture of the grounds upon which petitioner seeks further review of this case.

ARGUMENT.

I.

Petitioner assigns three reasons why certiorari should be granted for the purpose of reviewing the decision of the 7th Circuit Court of Appeals reported at 155 F. 2d 553. The first of these reasons is that petitioner contends that the 7th Circuit Court of Appeals in this decision, as well as certain preceding decisions, takes a different view of its function as a reviewing court in labor board cases than do other Circuit Courts of Appeal, notably the 2nd Circuit, 3rd Circuit, 4th Circuit, and 6th Circuit, and, accordingly, petitioner claims that this decision of the 7th Circuit Court of Appeals conflicts with certain decisions of the other courts mentioned. Secondly, petitioner contends that the decision of thhe Court of Appeals in this case evidences a failure of the 7th Circuit Court of Appeals to follow the injunction of this Court embodied in the case of *National Labor Relations Board* v. *Southern Bell Telephone Company*, 319 U. S. 50. Thirdly, petitioner insists that the Court of Appeals was not justified in refusing to enforce two minor provisions in the Board's order, namely, that directing Keystone to cease and desist from dominating or interfering with the administration of K.E.A. if it should return to existence; and that requiring the Company to rescind the invalid portion of its no-solicitation rule. It is apparent, however, from a reading of the petition that petitioner relies primarily upon the alleged conflict between the decision of the 7th Circuit Court of Appeals and the other Circuits mentioned as to the rules of law applicable to Labor Board cases upon appeal to the Circuit Court.

At the outset, we observe that the decision of the reviewing court in Labor Board cases, as in all other cases, depends upon the facts of the particular case, and that although the reviewing court's function in these matters is strictly limited by the statute, some review of the facts must necessarily be made. This Court will not grant its Writ of Certiorari for the purpose of reviewing evidence or the inferences drawn therefrom. *General Talking Pictures Corporation* v. *Western Electric Company, Inc., et al.* 304 U.S. 175; *Southern Power Company* v. *North Carolina Public Service Company, et al.*, 263 U.S. 508. In the first of these cases this Court said, at page 178:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

If, therefore, it develops that petitioner is merely complaining because it feels the Circuit Court of Appeals was in error in its view as to whether the Board's order was supported by substantial evidence there would be no occasion for the granting of this writ.

The fundamental rule laid down by this Court and by numerous decisions of all the various Circuit Courts of Appeal to be followed in reviewing orders of the National Labor Relations Board is that such orders must be supported by substantial evidence. The statute in Section 10 (e) (Title 29 U.S.C.A. Sec. 160 (e)), provides in part:

> "The findings of the Board, if supported by evidence, shall be conclusive."

This Court in *National Labor Relations Board* v. *Columbian Enameling & Stamping Company, Inc.*, 306 U. S. 292 in commenting upon this section said, at Page 299:

> "But as has often been pointed out, this • • • means evidence which is substantial, that is, affording • • • substantial basis of fact from which the fact in issue can be reasonably inferred • • • Substantial

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> evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' • • • and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

This basic principle as to the review of the Board's orders is the principle which has governed the 7th Circuit Court of Appeals in its decision in this case and it has governed the other Circuit Courts of Appeal in the decisions cited and referred to by petitioner in the footnote on Page 15 of its petition.

Thus the Court of Appeals in its decision in the case at bar after stating the facts briefly, says (B. A. 210):

> "The dominant question before us is whether there is substantial evidence to support the Board's finding that Keystone dominated and interfered with the formation and administration of Alliance."

After discussing the evidence with a view to determining this question, the Court says (B.A. 215):

> "We find in this record no evidence whatever to support the Board's charges that Keystone suggested, encouraged, or in any manner assisted in the organization or maintenance of Alliance; or that it dominated, aided, or in any manner interfered with its administration; or that it urged or warned any of its employees to join or assist Alliance."

Further, the Court concludes its opinion by saying (B.A. 219):

> "We are convinced that the findings are not supported by substantial evidence • • •"

Examination of the decisions cited in Footnote 9 on Page 15 of the petition in this case shows that the same legal principle was applied by the Circuit Courts of Ap-

peal in reviewing the Board in those cases. Thus, the 4th Circuit Court of Appeals in *Western Electric Company, Inc.* v. *National Labor Relations Board,* 147 F. 2d 519 said, at Page 521:

> "The crucial question in the instant case is whether the evidence supports the Board's findings that the Association is a successor to, and stands in the same position as, the Plan. By the terms of the Act we are bound by the findings of the Board unless it can be said that those findings are unsupported by substantial evidence, 29 U.S.C.A. Sec. 160(f)."

In its conclusion, the Court says at Page 523:

> "There is substantial evidence to support the conclusion reached by the Board that, under the circumstances obtaining in this case, these Plan representatives were unable to emancipate themselves from the domination of the Company so as to represent the employees fairly."

So also, the Third Circuit in *National Labor Relations Board* v. *Landis Tool Company,* 145 F. 2d 152, at Page 156 says:

> "We are of the opinion that the evidence, as set out above, is substantial and that it supports the findings and conclusions of the Labor Board."

The 6th Circuit in *National Labor Relations Board* v. *Mt. Clemens Pottery Co.,* 147 2d 262, does not state the grounds of its decision as clearly and briefly as do the other courts heretofore mentioned but its decision plainly recognizes the same rule and recognizes the need for substantial evidence of domination as a condition to the disestablishment of otherwise valid labor organizations. For example, that Court says, on Page 265 of its decision:

> "Were it possible for us to put into a separate compartment the circumstances relied upon to establish promotion and domination of the Co-Operative

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> by the respondent, and to insulate them from the unfair labor practices heretofore discussed, it would be difficult to perceive that such circumstances, even though credited by the Board, *rise to the dignity of substantial evidence disclosing domination.*" (Italics ours).

Even the 2nd Circuit, whose statements are so heavily relied upon by petitioner to disclose a variance between the decisions in the Circuit Courts of Appeal, apparently follows the rule above stated and in the case of *National Labor Relations Board* v. *Standard Oil Company, et al.*, 138 F. 2d 885, in addition to the language quoted in the petition, said on Page 888:

> "Theoretically there may be situations in which the cleavage between the old union and the new is such that a court could say that there was no 'substantial' evidence to support an order of 'disestablishment'."

Thus, although it is apparent that different results were reached by the Circuit Courts of Appeal in the decisions cited on Page 15 of the petition, and by the 7th Circuit in the case at bar, the facts in all these cases were different and the true reason for different results is not the application of different rules of law but rather the disparity in the facts.

The circumstances surrounding the formation of a new union, the conditions under which it was organized, the previous labor relations prevailing in the plant and other factors must necessarily vary in different cases, and these variations must necessarily lead to different results. This Court, if it is not to review every Labor Board case passed upon by a Circuit Court, can do no more than define the standards by which the record in such cases should be judged. We contend that such standards have already been formulated and that they are being followed

by all the Circuit Courts, and that whatever difference may be observed in the decisions on review must be charged to the existence of different facts and circumstances and not to the application of inconsistent legal principles.

As we have already noted, the term "substantial evidence" has already received careful attention and has been painstakingly defined. We do not believe the guides to proper review set out in that definition can be further refined, or that an attempt to do so could lead to any greater uniformity among the Circuit Courts than that prevailing at present.

To summarize then, the basic question is the scope of review of orders of the Board. The standards of review have been defined and fixed by the decisions of this Court in *Consolidated Edison Company* v. *National Labor Relations Board,* 305 U. S. 197 and *National Labor Relations Board* v. *Columbian Enameling & Stamping Company, Inc.,* 306 U. S. 292. Although different results have been reached in disestablishment cases by different Courts of Appeal, this was due, not to the application of an erroneous principle of law, but to the natural variation of facts and circumstances existing in different cases. All Circuit Courts apply the same rules of law in reviewing Labor Board cases and the uniform rule was applied in this case. Consequently, further review of this case would only be a review of the evidence. This is a matter for which this Court does not ordinarily grant its Writ of Certiorari.

The Board insists that the Circuit Court of Appeals has departed from the rules laid down by this Court for the handling of successorship cases in *National Labor Relations Board* v. *Southern Bell Telephone Company,* 319 U.S. 50; *National Labor Relations Board* v. *Link Belt*

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Company, 311 U.S. 584, *and Westinghouse Electric & Manufacturing Company* v. *National Labor Relations Board,* 312 U.S. 660. These decisions held, as shown by the quotation on Page 20 of the petition, that the Board may draw inferences of fact which will not be set aside because the Courts would have drawn a different inference. But this is far from saying that such inferences will not be set aside if they are not supported by substantial evidence, and it is clear that this Court in all its reviews of Labor Board decisions has insisted upon the substantial evidence rule.

We have already demonstrated that the 7th Circuit Court of Appeals has followed that rule and we believe that no departure from the injunctions of this Court has been demonstrated.

II.

The petition next seeks review upon the ground that the Court of Appeals wrongfully refused to enforce the Board's order requiring Keystone to cease and desist from dominating or interfering with the administration of K.E.A. and to refrain from recognizing K.E.A. in the event that organization should return to existence. It is submitted that enforcement of this portion of the order was rightfully denied. On its own initiative, Keystone had cut off relations with K.E.A. in March or April of 1937 (P.A. 220-222). Thereafter, K.E.A. was dissolved and Keystone notified of this dissolution (P.A. 322). So far as all parties in interest are concerned K.E.A. has been an absolutely non-existent organization for over nine years (P.A. 324).

Since the Company, of its own motion, cut off relations with K.E.A. no later than the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel*

Corporation, 301 U. S. 1, (P.A. 105) and since the organization has been non-existent for over nine years, the Board was not justified in entering its order in regard to K.E.A. in this case. The situation is far different from that prevailing in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, cited and relied upon by the Board and that case furnishes no authority here. In that case, *at the time of the Board's order,* the Union ordered disestablished was being used by the Company to defeat organizational activities of another labor organization. Subsequent to the order of the Board, another organization was certified as bargaining representative for certain of the Company's employees and it was claimed in this Court that the question as to the company's recognition of the old dominated union thereupon became moot. In dismissing this defense, this Court said at Page 272:

> "But an order of the character made by the Board, lawful when made, does not become moot, because • • • changing circumstances indicate that the need for it may be less than when made."

Here there was no need for the order when made and for this reason the Circuit Court was justified in refusing enforcement of that portion of the order.

III.

Finally, the petitioner claims the 7th Circuit Court of Appeals has departed from the rule laid down by this Court in *Republic Aviation Corporation* v. *National Labor Relations Board,* 324 U. S. 793, sustaining an order of the Board compelling rescission of a rule prohibiting all solicitation on Company property. In the case at bar the Company has always admitted, since the last mentioned decision, that its no-solicitation rule should be modified

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to prohibit solicitation only on Company time. It made such an admission in its brief in the Circuit Court of Appeals and it was apparently through oversight that this portion of the Board's order was not enforced. The Company is willing and herewith offers to enter into whatever consent order the Board wishes for the modification of its no-solicitation rule. The portion of the order relating to this rule is such a minor part of the controversy between the parties in this case that this oversight on the part of the Circuit Court should not form the basis for the granting of a Writ of Certiorari.

IV.

In addition to answering the matters set forth in the petition, this respondent desires to point out certain factors that make it inequitable for the issues in this case to be further reviewed and remain unsettled for any further period of time. These proceedings were instituted through the filing by the United Farm Equipment and Metal Workers of America, C.I.O. of charges against Keystone, and that Union was the motivating factor in the Board's action (P.A. 1, 2, 3, 4, 5, 6, 7 and 8). Subsequent to the Board's order and prior to proceedings for review in the Circuit Court of Appeals, representation proceedings were instituted by the C.I.O. Union before the Board, resulting in the Board entering a direction for an election to be held during the time the case was under consideration by the Circuit Court of Appeals (65 NLRB 274). This election is referred to and a small part of the results detailed in footnote 6a on page 12 of the Petition. The note is misleading. As a natural result of the Board's order in this case, Alliance was not permitted a position on the ballot and the employees were required to choose between the C.I.O. Union, the International Association of Machinists, and no union. This was

true at least of all production and maintenance employees who totaled between 1,500 and 1,600 persons. There were approximately 26 employees employed in the power house, consisting of engineers and engineers' helpers, in a group of 12 and firemen and oilers in a group of 14 and these two small groups were given the further choice of voting for A. F. of L. Craft Unions representing their respective crafts.

The results of the election, which was conducted by the Board and which no one attacked as unfair or in any way improper, were as follows:

Production and Maintenance Employees

Votes cast for C.I.O. Union	270
Votes cast for I.A.M.	66
Votes cast for no union	969
Challenged Ballots	25
Total Votes Cast	1330

Engineers

Votes cast for C.I.O. Union	0
Votes cast for A.F.L. Union	8
Votes cast for no union	4
Total Votes Cast	12

Firemen and Oilers

Votes cast for C.I.O. Union	0
Votes cast for A.F.L. Union	3
Votes cast for no union	4
Total Votes Cast	7

The only reasonable inference to be drawn from this vote is that the employees decisively rejected any attempt of the C.I.O. Union to be their bargaining agent

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and that approximately three-fourths of them clearly preferred to have their own union or none. Section 7 of the Wagner Act (Title 29 U.S.C.A. Sec. 157) provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

This Court, in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 at Page 33, said, in commenting upon this section:

> "That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."

Again at Pages 43 and 44, the Court said:

> "Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work."

See also *Allan-Bradley Local No.* 1111, *et al.* v. *Wisconsin Employment Relations Board*, 237 Wis. 164, 295 N.W. 791; affirmed, 315 U.S. 740; *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261. If this fundamental and basic right of workers is to be given effect, the results of the election held by the Board must be considered and should not, in this case, be overridden because of any desire on the part of the Board to have its general legal position strengthened in the 7th Circuit Court of Appeals. We contend that it would be highly inequitable and an injustice to Keystone workers to, in any way, alter the present situation and to unsettle a

management labor relation that is now, and has been for several months, completely settled.

For the foregoing reasons, we respectfully urge that the petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

HUGH FULTON,
R.C.A. Building
New York, N. Y.

THEODORE C. BAER
First National Bank Building
Peoria, Illinois
Attorneys for Respondent,
Keystone Steel & Wire Company.

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